

ALAN J. DROSTE [SBN 105616]  
[adroste@kpdlex.com](mailto:adroste@kpdlex.com)  
KING PARRET & DROSTE LLP  
450 Newport Center Drive, Suite 500  
Newport Beach, CA 92660  
Telephone: (949) 644-3484  
Facsimile: (949) 644-3993

KALINA PAGANO (*pro hac vice*)  
[kpagano@vpxsports.com](mailto:kpagano@vpxsports.com)  
VICTORIA N. GODWIN (*pro hac vice*)  
[vickeyg@vpxsports.com](mailto:vickeyg@vpxsports.com)  
VITAL PHARMACEUTICALS, INC.  
1600 North Park Drive  
Weston, FL 33326  
Telephone: (954) 641-0570  
Facsimile: (954) 389-6254

Attorneys for Vital Pharmaceuticals, Inc.

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

HANSEN BEVERAGE COMPANY, a  
Delaware corporation,

Plaintiff,

v.

VITAL PHARMACEUTICAL, INC aka  
VPX, a Florida corporation,

Defendant.

Case No. 08-CV-1545 IEG (WVG)

**RESPONSE OF DEFENDANT VITAL  
PHARMACEUTICALS, INC. TO  
PLAINTIFF'S OBJECTIONS TO AND  
MOTION TO STRIKE RE VITAL'S  
EVIDENTIARY OBJECTIONS AND  
RESPONSE TO PLAINTIFF'S EVIDENTIARY  
OBJECTIONS IN SUPPORT OF  
VITAL'S MOTION FOR SUMMARY  
JUDGMENT, OR IN THE ALTERNATIVE,  
PARTIAL SUMMARY JUDGMENT**

Before: Hon. Irma E. Gonzalez  
Date: April 12, 2010  
Time: 10:30 a.m.  
Courtroom: 1

Defendant Vital Pharmaceuticals, Inc. ("VPX") presents the following Response to the  
Objections To And Motion To Strike Evidence of Hansen Beverage Company ("Hansen")  
submitted on April 8, 2010 (D.E 122).

1 I. INTRODUCTION AND SUMMARY OF ARGUMENT.

2 On March 29, 2010, in reply to Hansen's opposition to VPX's Motion for Summary  
 3 Judgment, or in the Alternative Partial Summary Judgment (D.E. 107; the "Motion"), VPX timely  
 4 filed documents as part of its reply papers: (1) Evidentiary Objections and Request to Strike  
 5 Portions of the Declarations and Reports of Thomas P. Davis, I. Glenn Sipes, Robert Girandola and  
 6 Itamar Simonson (D.E. 120-1), supported by the Droste Declaration and Exhibits (D.E. 120-2);  
 7 and (2) Response to Hansen's Evidentiary Objections and Motion to Strike Affidavits (D.E. 120-3),  
 8 supported by the Pagano Declaration and Exhibits (D.E. 120-4). The evidence submitted in support  
 9 of VPX's Evidentiary Objections and its Response to Hansen's evidentiary objections is not "new  
 10 evidence" in support of VPX's Motion. Rather, all of the supporting evidence demonstrates both  
 11 that Hansen's purported "evidence" in opposition is inadmissible to create a genuine dispute and  
 12 that Hansen's objections to the evidence supporting VPX's Motion are without merit.

13 Although Hansen possessed VPX's reply papers since March 29, it waited until after close  
 14 of business on April 8 to file unauthorized and insupportable additional objections. Those  
 15 objections should be disregarded and/or overruled.

16 II. THE "EVIDENCE" HANSEN POINTS TO IS NOT "NEW EVIDENCE" IN SUPPORT  
 17 OF VPX'S MOTION FOR SUMMARY JUDGMENT.

18 VPX "incorporated by reference" its Response in opposition to Hansen's Motion for  
 19 Summary Judgment as a means of avoiding repetitive legal argument. This Court had ordered all  
 20 of these motions be heard as part of the same proceedings (D.E. 111), and Hansen's motion covers  
 21 one of the same issues – the "7 hour" marketing statement – which is addressed in VPX's Motion.

22 As is plain from VPX's reply papers, the evidence submitted by VPX on March 29, 2010, in  
 23 support of its Objections demonstrates that the "expert" reports and declarations filed by Hansen  
 24 with its opposition do not create a genuine dispute. Also, Hansen's objections to the Buffington  
 25 Declaration, in light of his reports and additional deposition testimony which Hansen omits from its  
 26 disingenuous objections, are shown to be without merit in light of the actual reports and deposition  
 27 testimony of Dr. Buffington, which are provided in Response to Hansen's objections. The Court  
 28 should review this material in granting VPX's objections and in overruling Hansen's.

1 III. HANSEN ITSELF MADE THE GRIFFITHS AND CHILDS STUDIES PART OF THE  
 2 RECORD ON VPX’S SUMMARY JUDGMENT MOTION, AND THE COURT CAN  
 3 TAKE JUDICIAL NOTICE OF THESE STUDIES.

4 The Buffington Declaration – as he had testified at length in his deposition – relied on the  
 5 findings of Childs and Griffiths, among other reports, to state his opinion that the amount of  
 6 caffeine remaining for metabolism in the bloodstream of an average consumer seven hours after  
 7 consumption of a single serving of Power Rush is amply sufficient to provide energy. The  
 8 Buffington Declaration cites the Childs and Griffiths studies and sets forth their findings.

9 In addition, VPX’s Motion at page 5 expressly states that it is based, among other things, on  
 10 “the complete files and records of this action, on the matters of which the Court may take judicial  
 11 notice, and on such other and further materials as may be presented and considered by the Court  
 12 prior to ruling on this Motion.” (Emphasis added.) As part of Hansen’s opposition, filed on March  
 13 22, 2010, Hansen submitted a Notice of Lodgment (D.E. 115-7), which attaches as Exhibits 4 and  
 14 5, respectively, the full copies of the very studies by Childs and Griffiths relied upon by Dr.  
 15 Buffington. Accordingly, the Court can and should take judicial notice of this additional material,  
 16 over which there is no dispute about authenticity, which Hansen also has provided and made part of  
 17 the record of these proceedings.

18 IV. THE PAGANO DECLARATION AND EXHIBITS SUPPORT VPX’S RESPONSE TO  
 19 HANSEN’S EVIDENTIARY OBJECTIONS AND ARE NOT “NEW EVIDENCE” IN  
 20 SUPPORT OF VPX’S MOTION.

21 Despite Hansen’s mischaracterizations, the Pagano Declaration and the attached Exhibits  
 22 were not new evidence in support of VPX’s Motion submitted for the first time on reply. Rather,  
 23 the Pagano Declaration and attached Exhibits were submitted in support of VPX’s Response to  
 24 Hansen’s Evidentiary Objections in opposition to VPX’s Motion for Summary Judgment. (See D.E.  
 25 120-3; 120-4) The Pagano Declaration and the attached Exhibits were provided to demonstrate  
 26 that, by Hansen’s mischaracterizing and omitting relevant parts of the record with regard to Dr.  
 27 Buffington, Hansen had submitted objections that were without merit.

VPX was fully entitled to respond to Hansen's Evidentiary Objections, and VPX did so with supporting documentation that demonstrates the invalidity of Hansen's objections. Hansen also inaccurately asserts that VPX had never provided anything more than the authors' names and the dates of the Childs and Griffiths studies. Contrary to Hansen's misleading objections, VPX has demonstrated not only that Dr. Buffington's opinion was not changed from the outset, but also that Hansen was provided with and fully examined Dr. Buffington on the Childs and Griffiths reports during his deposition. (See D.E. 120-3; 120-4.) Again, these are the same reports Hansen makes part of the record by its Notice of Lodgment. (D.E. 115-7, Exhibits 4 and 5.)

There is no law, and Hansen cites none, to support its assertion that VPX's expert opinion testimony, properly based on existing research studies on caffeine metabolism, must be limited to those studies that were referenced by VPX in party discovery. Only by attempting to apply an incorrect and insupportable legal standard does Hansen make such an assertion. Rather, Hansen's pleading placed at issue its claim that the "\*7 Hour Energy Boost" tag line is "untruthful based on the drink's ingredients and generally accepted principles of biochemistry, pharmacology and physiology." Dr. Buffington demonstrated that there is no genuine dispute to support Hansen's claim based on "generally accepted principles of biochemistry, pharmacology and physiology." Hansen has no valid basis to exclude Dr. Buffington's declaration, and Hansen's evidentiary objections should be overruled.

V. THE DROSTE DECLARATION AND EXHIBITS SUPPORT VPX'S EVIDENTIARY OBJECTIONS TO HANSEN'S EXPERT REPORTS AND DECLARATIONS AND ARE NOT "NEW EVIDENCE" IN SUPPORT OF VPX'S MOTION.

The factual record supporting VPX's Evidentiary Objections calls for the exclusion of Hansen's expert reports and declarations, which fail to create a genuine dispute. Hansen's belated objections once again mischaracterize VPX's Evidentiary Objections, supported by the Droste Declaration and Exhibits, which do not present new evidence submitted for the time on reply as factual support for VPX's Motion. Rather, the Droste Declaration and Exhibits were filed in support of VPX's Evidentiary Objections and Request to Strike. (See D.E. 120-1; 120-2.)

1 As is apparent from VPX's Objections and supporting Exhibits, the actual report and  
2 testimony of Hansen's pharmacological expert, Dr. Sipes, does not create a genuine dispute. Dr.  
3 Sipes does not dispute the mechanics of caffeine metabolism through successive "half-lives." He  
4 does not dispute the amount of caffeine available in the bloodstream after seven hours based on  
5 those average half-lives. Although his report attempts to point only to the shorter average half-life  
6 range of 3-5 hours (itself sufficient to grant VPX's Motion), he acknowledges in his deposition that  
7 4-6 hours is essentially the same (consistent with the 5-hour average half-life in the Magkos study  
8 also advanced by and relied on Hansen to show a 2.5 to 10 hour range).

9 Hansen cannot challenge the authenticity of the Childs and Griffiths studies, and by stark  
10 contrast Hansen has never submitted a study showing that any amount of caffeine, whether 50 mg,  
11 30 mg or lower, provides no energy. Indeed, Dr. Sipes testified he "does not know" the lowest  
12 amount of caffeine that would have no energizing effect.

13 Finally, Dr. Sipes' report does not take a position that there would not be energy from  
14 caffeine at seven hours following consumption of a single serving of Power Rush. Instead, Dr.  
15 Sipes testified that "he does not know" and would have to "speculate" about whether the energy  
16 from caffeine from a single serving of Power Rush after seven hours would prevent an average  
17 consumer from going to sleep and staying asleep. Nothing in the Sipes report submitted by Hansen  
18 creates a genuine dispute.

19 Similarly, the Girandola study, despite attempting to coach the subjects to report a biased  
20 result in favor of Hansen, was shown to be based on actual findings that support VPX's position.  
21 Only by applying an inaccurate legal standard that subjects must demonstrate energy on "all"  
22 measures, obscured by "averaging," does Girandola disregard the actual objective and subjective  
23 findings of energy. Again, in light of his actual findings, under the correct legal standard, no  
24 genuine dispute is created by Dr. Girandola.

25 Dr. Simonson admits in his deposition that his report has no relevance to the issue of  
26 liability and simply assumes no scientific support for the "7 hour" statement. No reports or  
27 declarations filed with Hansen's opposition create a genuine dispute, as established by VPX's  
28 Evidentiary Objections and supporting material, including the deposition transcripts of Sipes,

1 Girandola and Simonson submitted as evidence in support of VPX's Evidentiary Objections to  
2 Hansen's opposition to VPX's Motion.

3 VI. CONCLUSION.

4 VPX's Motion addressed the contention placed at issue by Hansen's pleadings, that the "\*7-  
5 Hour Energy Rush" tag line allegedly was "untruthful based on the drink's ingredients and  
6 generally accepted principles of biochemistry, pharmacology and physiology." VPX's Evidentiary  
7 Objections to Hansen's opposition and its Response to Hansen's objections do not constitute "new  
8 evidence" in support of the Motion and accordingly should be accepted by the Court for the reasons  
9 submitted. VPX respectfully requests that the Court overrule Hansen's Objections and deny its  
10 Motion to Strike.

11 Dated: April 9, 2010

Respectfully Submitted,

12 /S/ Alan J. Droste

13 ALAN J. DROSTE [SBN 105616]

adroste@kpdlex.com

KING PARRET & DROSTE LLP

450 Newport Center Drive, Suite 500

Newport Beach, CA 92660

Telephone: (949) 644-3484

Facsimile: (949) 644-3993

16 KALINA PAGANO (*pro hac vice*)

17 kpagano@vpxsports.com

VICTORIA N. GODWIN (*pro hac vice*)

18 vickeyg@vpxsports.com

VITAL PHARMACEUTICALS, INC.

19 1600 North Park Drive

Weston, Florida 33326

20 Telephone: (954) 641-0570

21 Facsimile: (954) 389-6254

22 Attorneys for Defendant

Vital Pharmaceuticals, Inc.

**CERTIFICATE OF SERVICE BY ELECTRONIC DELIVERY – CM/ECF**

I, Alan J. Droste, hereby declare as follows:

1. I am over the age of 18 years and am not a party to the within cause. I am employed in the County of Orange, State of California.

2. My business address is 450 Newport Center Drive, Suite 500, Newport Beach, California, 92660.

3. On April 9, 2010, I served a true copy of the attached document titled exactly:

**RESPONSE OF DEFENDANT VITAL PHARMACEUTICALS, INC. TO PLAINTIFF'S  
OBJECTIONS TO AND MOTION TO STRIKE RE VITAL'S EVIDENTIARY  
OBJECTIONS AND RESPONSE TO PLAINTIFF'S EVIDENTIARY OBJECTIONS IN  
SUPPORT OF VITAL'S MOTION FOR SUMMARY JUDGMENT, OR IN THE  
ALTERNATIVE, PARTIAL SUMMARY JUDGMENT**

by causing it to be electronically filed with the Clerk of the Court using the CM/ECF system, which sent electronic notification of such filing to all other persons appearing on the docket sheet, intended to be listed below:

Edward J. McIntyre <emcintyre@swsslaw.com>  
Tanya M. Schierling <tschierling@swsslaw.com>  
Jenny L. Dixon <jdixon@swsslaw.com>  
Michael M. Vasseghi <mvasseghi@swsslaw.com>  
Thomas F. Landers <tlanders@swsslaw.com>  
Solomon Ward Seidenwurm & Smith  
401 B Street, Suite 1200  
San Diego, CA 92101

Counsel for Plaintiff

Kalina Pagano <kpagano@vpxsports.com>  
Victoria N. Godwin <vickeyg@vpxsports.com>  
Vital Pharmaceuticals, Inc.  
1600 Northpark Drive  
Weston, FL 33326

Co-Counsel for Defendant

I declare under penalty of perjury that the foregoing is true and correct. Executed this 9th day of April, 2010, at Newport Beach, California.

/S/ Alan J. Droste

Alan J. Droste  
<adroste@kpdlex.com>